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No. 85-937

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF WEST VIRGINIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in this suit by the United States against the State of West Virginia for breach of contract, the courts below correctly concluded that state officials, including the Governor, were authorized to enter into the contract.

2. Whether the court of appeals erred in awarding pre-judgment interest to the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D1-D25) is reported at 764 F.2d 1028. The opinion of the district court on petitioner's motion to dismiss and the government's cross-motion for summary judgment (Pet. App. A1-A50) is reported at 537 F. Supp. 388. The opinions of the district court on liability (Pet. App. B1-B75) and prejudgment interest (Pet. App. C1-C30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1985. A petition for rehearing was denied on July 31, 1985 (Pet. App. E1-E3). On October 25, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 28, 1985, a national holiday (Pet. App. F1). The petition was filed on November 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Disaster Relief Act of 1970 (the Act), Pub. L. No. 91-606, 84 Stat. 1744 *et seq.*, repealed in part by Pub. L. No. 93-288, § 603, 88 Stat. 164, provided "assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from * * * disasters * * *." (§ 101(b), 84 Stat. 1745). The remedial provisions of the Act were triggered by a Presidential declaration of a "major disaster" (§ 201(a), 84 Stat. 1746). Congress authorized the provision of, inter alia, temporary housing or other emergency shelter to the victims of a major disaster. Except in circumstances not relevant here, temporary dwellings were provided by the federal government and installed at sites prepared by the state or local governments. Section 226(a) of the Act (84 Stat. 1752) stated:

> Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided by State or local government * * * without charge to the United States. However, the Director [of the Office of Emergency Preparedness] may elect to provide other more economical and accessible sites at Federal expense when he determines such action to be in the public interest.

In keeping with the legislative design to offer federal aid to states to help them provide disaster relief, which has traditionally been a local responsibility, program regulations required that, before federal resources would be expended, the state enter into an agreement in which it committed itself to provide substantial financial assistance (32 C.F.R. 1710.7(a) (1972)).

2. On February 26, 1972, heavy rains caused a coal waste dam to fail, leading to severe flooding of the Buffalo Creek near Mann, West Virginia. Over 100 persons died as a result of the flooding, and there was substantial property loss. The

President declared the "Buffalo Creek Disaster" a major disaster within the meaning of the Act. Pet. App. B4-B6. There followed immediate discussions between the United States Army Corps of Engineers and the Governor of West Virginia concerning, inter alia, the division of responsibility for assistance between West Virginia and the federal government (C.A. App. 906-930). The Governor issued a statement to the press explaining that the federal government would bring in house trailers and that petitioner would prepare sites that would provide electricity (*id.* at 280).

It soon became apparent, however, that the State would be unable to prepare the sites for the federally supplied trailer homes (C.A. App. 815-816, 907, 912, 933-936). On February 28 or 29, 1972, petitioner asked the Corps of Engineers to prepare the sites, and on March 1, 1972, petitioner issued the first of a series of written requests to the Corps of Engineers. The March 1 letter stated: "As this is the State's responsibility, this office will be responsible for costs incurred for this assignment" (Pet. App. B16). The letter was signed by John M. Gates, who was Director of petitioner's Office of Emergency Planning, petitioner's Commissioner of Finance and Administration, and the "Governor's Authorized Representative" for the disaster relief program (Pet. App. B52). On March 4, 1972, the Governor executed a Federal-State Disaster Assistance Agreement, which included the Governor's certification that Mr. Gates was empowered to execute all necessary documents (*id.* at B16-B18; C.A. App. 91-105). Thereafter, the Corps of Engineers received a series of requests from Mr. Gates for additional site work containing the acknowledgement that petitioner would be responsible for the costs of site preparation (Pet. App. B18-B20). Pursuant to these requests the Corps expeditiously completed extensive work, including the preparation of 617 mobile home sites in two

months. Thereafter, Mr. Gates certified that the work was satisfactorily completed. *Id.* at B20.

In late August 1972, West Virginia was again struck by flooding. Although there was no loss of life caused by the "Gilbert Creek Disaster," once again many persons lost their homes. In a manner essentially identical to the Buffalo Creek Disaster transactions described above, the President declared a major disaster, and the United States (through the Corps of Engineers) prepared sites at petitioner's request. Pet. App. B22-B26.

The Corps of Engineers duly billed petitioner for the extensive site preparation. During the years that followed, petitioner never disputed that the work had been performed satisfactorily or that the costs were as represented by the Corps; to the contrary, the Governor acknowledged the debt and appeared to be taking steps toward its payment. Informal efforts to obtain payment, however, were not successful. Pet. App. B26-B28.

3. In 1978, the United States sued petitioner in the United States District Court for the Southern District of West Virginia, seeking to recover $4,341,790.03 expended on its behalf in connection with the two disasters (Pet. App. A10, A43), plus prejudgment interest. The district court entered an opinion on pretrial motions rejecting petitioner's defense that its sovereign immunity precluded suits brought by the United States and holding that the district court had jurisdiction to entertain the suit under 28 U.S.C. 1345 (Pet. App. A11-A23). The court also ruled that federal law would control (*id.* at A23-A36) and that there were no material facts in dispute regarding the costs of the work performed (*id.* at A43-A50). The court found, however, that there were material factual disputes that precluded awarding summary judgment to either party on the question of liability, notably petitioner's argument that the Governor and Mr. Gates

lacked authority to enter into these contracts with the federal government (*id.* at A37-A42).

After trial, the district court ruled in favor of the United States on the question of liability (Pet. App. B1-B75). The court held that the statutes of West Virginia authorized the Governor, under emergency conditions, to commit the State to expenditures such as those involved here without resort to the normal procurement process (*id.* at B29-B35).[1] The court further found as a factual matter that the Governor requested the Corps of Engineers to prepare sites for the federally-provided temporary homes as an agent for the State — a holding supported by the "overwhelming volume of credible evidence" (*id.* at B49-B50).

In a separate opinion, the district court denied the United States' request for prejudgment interest (Pet. App. C1-C30). The court held that the award of prejudgment interest was discretionary (*id.* at C27). Balancing the dominant purpose of the legislation (disaster relief), the non-voluntary manner in which the debt was incurred, and the hardship upon West Virginia citizens, the court concluded (*id.* at C29-C30):

> As between the citizens of West Virginia and all the citizens of the United States, it appears more equitable to have the latter share in the defraying of the costs of the services rendered by the United States Army Corps of Engineers.

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[1]The district court observed: "It is inconceivable * * * that before such work could have begun competitive bids would have been required, detailed written contracts executed, and the approval of no less than three State officials obtained." This proposition was also found to be inconsistent with petitioner's Emergency Plan that was in effect in 1972 (*id.* at B32-B33).

4. The court of appeals affirmed the liability judgment in favor of the United States on the basis of the district court's decision (Pet. App. D9-D10), but it reversed the district court's refusal to award prejudgment interest (*id.* at D10-D25). Citing numerous precedents, the court of appeals ruled that prejudgment interest on contract claims involving liquidated damages should be awarded as a matter of right (*id.* at D11-D14). The court also found that, applying the district court's approach of balancing the equities, it would still be appropriate to award prejudgment interest to the United States here (*id.* at D18-D25), because "it is manifest beyond any doubt that the equities weigh overwhelmingly in favor of the United States" (*id.* at D22).

ARGUMENT

1. Petitioner briefly contends (Pet. 22-29) that the judgment below violates the Tenth Amendment because it interferes with West Virginia's allocation of internal governmental power. Petitioner did not make this Tenth Amendment argument in the court of appeals, and accordingly the Court ought not to consider it here. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the claim is wholly without merit.

Petitioner assumes without discussion that the Governor lacked the power to bind it to pay for the work the federal government did at its request because of failure to follow ordinary appropriation procedures. This contention was rejected by both lower courts; the district court explained in detail that these expenditures for site preparation were authorized under petitioner's emergency powers statute and its own emergency plans (Pet. App. B31-B35). There is no reason for this Court to grant certiorari to reconsider a construction of state law (see Pet. 16) in which both lower courts concurred. See *Butner* v. *United States*, 440 U.S. 48, 58 (1979); *Bishop* v. *Wood*, 426 U.S. 341, 346 & n.10 (1976).

Moreover, petitioner gives no persuasive reason for doubting the correctness of that construction.[2] Indeed, petitioner's suggestion that the United States should have ignored petitioner's urgent request for help and left its citizens without shelter in 1972 cannot be taken seriously; it is hard to believe that either the citizenry or the legislature of West Virginia would have applauded the United States' concern for state procedure had the United States followed that course at the time. Thus, the premise of petitioner's contention — that the Governer lacked authority to enter into the contracts involved here — is erroneous, and there is no basis for a Tenth Amendment claim. Petitioner remains free to adopt whatever governmental procedures it chooses and to follow them; the court of appeals simply held that the contracts entered here were valid under state law (Pet. App. D9).

2. Petitioner contends (Pet. 29-47) that the court of appeals' award of prejudgment interest was erroneous. Petitioner does not contend that prejudgment interest may never be recovered by the United States from a state (see Pet. App. D16-D17), but it argues that, on the facts of this case, a balancing of the equities requires that it not be charged prejudgment interest. This contention was carefully considered and rejected by the court of appeals, and we rely upon its discussion of the issue (Pet. App. D18-D24). It is true, of course, that the United States has greater resources than the State of West Virginia (see Pet. 38-39), but Congress took such matters into account in deciding that the extensive federal disaster relief provided would not include site preparation. Indeed, the United States paid more than $30 million for flood relief, many times what the

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[2]Indeed, in 1973, in the wake of the flooding disasters, the West Virginia legislature acted to clarify the scope of these emergency powers to insure that actions such as those taken by the Governor here would not be subject to any doubt (Pet. App. B32 n.7).

State was obligated to pay for site preparation. Given that petitioner has appropriated funds to pay this judgment, which are meanwhile collecting interest on petitioner's account, and that petitioner has received a substantial settlement of a tort suit to compensate it for expenditures that thus far have been borne entirely by the United States, it would be completely unreasonable to hold that the equities warrant denying the United States compensation for the use of its money (see Pet. App. D20-D21).[3]

Board of County Commissioners v. *United States*, 308 U.S. 343 (1939), on which petitioner almost exclusively relies, is inapposite. That case held that "in governmental actions based upon quasi-contractual obligations * * *," interest "is given in response to considerations of fairness." *Id.* at 352. In *Board of County Commissioners*, the state had mistakenly collected taxes from an Indian solely because of an error by the federal government. To say that a state is not obligated to pay prejudgment interest when it has used money because "in all innocence [it] acted in reliance on" federal action (*ibid.*) does not mean that petitioner is entitled to the same consideration when it has steadfastly and for more than a decade refused to pay a debt that it has long acknowledged — a debt incurred when the federal government answered petitioner's request to help it recover from a natural disaster. As the court of appeals concluded (Pet. App. D22), "it is manifest beyond any

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[3]The court of appeals also stated its view that in the unusual circumstances involved here — a suit for breach of contract where the claim has been liquidated — the United States is entitled to prejudgment interest as a matter of right (Pet. App. D11-D14). Whether this view would be correct in a case where substantial equities weighed in favor of the state is a question that cannot be answered here, because the court of appeals' alternative holding that equitable considerations justify an award of prejudgment interest is plainly correct.

doubt that the equities weigh overwhelmingly in favor of the United States."[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]Petitioner does not rely on the Debt Collection Act of 1982, which excludes states from certain prejudgment interest obligations owed to the United States (see 31 U.S.C. 3701(c)); that Act does not apply to this case because the contract in question was entered long before the effective date of the statute. See 31 U.S.C. 3717(g)(2). Thus, the decision below does not conflict with cases applying that Act in connection with monies owed by the states to the United States under the Food Stamp program. See *Commonwealth of Pennsylvania* v. *United States*, No. 85-5186 (3d Cir. Jan. 6, 1986), slip op. 14-18; *Perales* v. *United States*, 598 F. Supp. 19 (S.D.N.Y.), aff'd, 751 F.2d 95 (2d Cir. 1984). In addition, we note that in those cases the relevant statute contemplated that monies would be owed by the states to the federal government under the Food Stamp program and ultimately paid after judgment (see *Perales*, 598 F. Supp. at 24-25); thus, it is not unreasonable to attach some significance to the statute's failure to deal explicitly with the question of prejudgment interest. Here, however, the Disaster Relief Act of 1970 contemplated that the states themselves would prepare the sites and pay the costs associated with that preparation; the issue of a later payment by the State to the federal government arose in this case — a breach of contract suit — only because the United States acceded to petitioner's special request that the United States prepare the sites itself in the first instance, subject to reimbursement.